IN THE SUPREME COURT OF FLORIDA

MICHAEL ALAN LAWRENCE,

Appellant,

v. CASE NO. 82,256

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This is an appeal of a resentencing proceeding. References to the one-volume record on appeal are designated by "R" and the page number. References to the one-volume transcript of the resentencing proceeding are designated by "T" and the page number. References to the supplemental record, containing a corrected copy of the trial judge's sentencing order, are designated by "SR" and the page number.

STATEMENT OF THE CASE

Appellant, MICHAEL ALAN LAWRENCE, was charged and convicted for the September 29, 1986, first-degree murder, kidnapping, and armed robbery of a convenience store clerk, Paula Tyree. Lawrence v. State, 614 So. 2d 1092 (Fla. 1993). (R 4-13). On direct appeal, this Court vacated the death sentence and directed the trial court to empanel a jury and conduct a new penalty proceeding. Id. (R 13). In so doing, the Court struck three aggravating factors found by the trial court. Id. at 1096. (R 11-12). The Court also vacated the kidnapping conviction because there was no evidence Lawrence forced the victim into the storeroom where her body was found. Id. (R 11).

A new penalty proceeding was held before Circuit Judge Edward P. Nickinson, III, [1] on June 21-22, 1993. The jury, by a vote of 12-0, recommended the death penalty. (R 20).

The court received sentencing memoranda from the state and the defense on July 12 and 13, 1993 (R 21-24, 45-52), and heard additional argument orally on July 13, 1993. (R 25-43). On July 19, 1993, the trial judge sentenced Lawrence to death, finding three aggravating factors: that the crime was committed while Lawrence was under sentence of imprisonment; that Lawrence had previously been convicted of a violent felony; and

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[1]The original trial judge was Circuit Judge Jack R. Heflin. Lawrence, 614 So. 2d at 1092.

that the murder was committed for pecuniary gain. The court found no statutory mitigating circumstances. As to non-statutory mitigation, the court considered mental and emotional disturbance as a non-statutory factor but concluded the factor either had not been proved or was not entitled to substantial weight. (R 65-69).

Notice of appeal was timely filed August 17, 1993. (R 74).

STATEMENT OF FACTS

On Tuesday, June 22, 1993, before any evidence was presented, the prosecutor asked the trial judge to allow the state to read to the jury the testimony Sonya Gardner gave at Lawrence's earlier trial. To demonstrate Gardner's unavailability, the state presented the testimony of one of its investigators, Tom Tucker. Tucker was given his assignment to locate Gardner the Thursday before trial. He began trying to locate her the next day, Friday, by leaving messages for her with several people in Santa Rosa County who knew her. (T 65). Gardner called Tucker on the phone late Sunday night and said she was camping out in Blackwater State Park. She said she did not want to testify but eventually agreed to be at the courthouse at nine o'clock the next morning. She did not show up. Around 2:30 that afternoon, she called Tucker and said she was not coming because she did not want to leave her camping equipment. She also said she did not want to have anything to do with the trial and was scared of people in that area. Around five o'clock that afternoon, Gardner's boyfriend called Tucker and said Gardner still did not want to come and would come only if forced. (T 66-67). He said he would direct Tucker to where they were camping if necessary. (T 69). Tucker told them he would call them back if there were no way around Gardner's being there. Tucker never called them back and never got the directions. (T 67, 69-70).

The prosecutor said the State Attorney's office had sent a subpoena to Gardner's last known address in Oklahoma on May 29. The receipt came back signed by Gardner's ex-husband. (T 69). The prosecutor conceded Gardner's testimony was not relevant to any of the aggravating circumstances but would give an overview of the underlying facts of the crime. Lawrence objected to the reading of Gardner's former testimony, arguing the state had not exhausted its efforts to secure her presence and her testimony was not relevant. (T 70-71).

The trial judge ruled Gardner's former testimony inadmissible because the state had failed to satisfy the unavailability requirement. (T 71).

The state presented several witnesses to establish an overview of the crime. A Pensacola police officer said he went to the Majik Market on Scenic Highway on September 29, 1986, after receiving a call that the clerk could not be located. (T 81-82). He arrived around 11:50 p.m. The cash register drawer was open. Inside a storage room located off the west wall near the middle of the store was the deceased clerk, lying face down on the floor with several wounds to the back of her head. (T 83). A crime scene investigator said there were two marks on the floor near the victim's head that were consistent with bullets ricocheting off the floor. Photographs showing the bullet ricochets were admitted into evidence. (T 90-91). The supervisor of the store at the time the offense occurred said

she determined the following day, after the police finished their work, that $58 was missing from the store. (T 88).

The state next presented Georgia Crowell, an aquaintance of Lawrence's around the time of the homicide. At that time, Crowell was living on Scenic Highway, less than a mile from the Majik Market where the murder took place. (T 93-94). Over Lawrence's objection, the prosecutor was allowed to ask the witness whether Lawrence said anything to her in September of 1986 about a plan to do a robbery. Crowell responded, "Some type of plan to get money." (T 94). Crowell also was allowed to testify, over Lawrence's objection, that Lawrence told her sometime in early October of 1986 that he went across the street to the Majik Market intending to rob it but could not do so after looking at the clerk. (T 94-96).

Crowell said when she visited Lawrence in the Escambia County Jail after his arrest and asked him if he had done the Majik Market murder, he told her he could not discuss it because "they would ask me questions and he didn't want to involve me." (T 97). When asked if Lawrence said anything about whether the police would be able to tie him to the gun used in the murder, Crowell said he told her not to talk about it, that they would never find the gun because it was in the river. (T 98). Lawrence's objection to this testimony was overruled. Crowell continued, saying Lawrence told her not to answer any questions the police asked her about the gun, not to

involve him in any way, and not to say anything about what he said about the gun he had given Sonya Gardner being in the river. (T 98).

The state next put on Larry Conti, who said he was in the Majik Market the night of September 29, 1986. Over defense objection, Conti said the clerk was very rude to him and when he said something to her about the change being wrong, she ignored him and walked away. (T 101-102).

The next witness, Melvin Summerlin, testified that while he was incarcerated with Lawrence in the Escambia County Jail in April of 1987, Lawrence talked about the Majik Market murder, saying if the police could find a gun Sonya had, they could probably put it back on him. (T 104). After Lawrence's objection to this testimony was overruled, Summerlin testified on cross-examination that Lawrence told him he did not remember what happened at the Majik Market because he was strung out on cocaine. (T 105).

At this point in the proceeding, the trial judge announced,

> I think I am willing to change my ruling about Sonya Gardner's availability. I am concerned about relevance. One of the things that occurred to me and, Mr. Dees, I know that one of the mitigating factors you have just touched on it, I think one of the mitigating factors you may argue may have to do with whether the defendant acted under extreme mental or emotional distress or stress and if, in fact, she was with the defendant on the night of the killing, she may be able -- 1 don't know what her -- I

> don't know if her testimony speaks to that.
> I would be more inclined to all -- unless you are going to announce that you're not going to argue that as a mitigator, Mr. Dees, I would be more inclined to allow that than a great deal of facts about who did what with guns afterwards. I don't really think that speaks to any of the aggravating factors or mitigators.

(T 105-106). The trial court then ruled Gardner's former testimony "about what she saw and heard right around the time of the murder. . . . particularly if it deals with [Lawrence's] demeanor or state of mind" was appropriate. (T 106-107). Over Lawrence's renewed objection, the prosecutor read Gardner's prior testimony to the jury.

Gardner met Lawrence in the summer of 1986. She was pregnant at the time and gave birth on October 31, 1986. (T 109). The night of the homicide, Gardner was with Lawrence and Steven Pendleton, known to her as "Snake." Lawrence came over to Gardner's house in Milton around ten o'clock that night. He said he was doing cocaine and wanted someone to talk to. He asked Gardner if she would ride to Pensacola with him to get a bottle. (T 110). Lawrence drove. When they got to Scenic Highway in Pensacola, they stopped at the Majik Market and got gas. Lawrence pumped the gas. Pendleton got out and went to the back of the car, then got back in the car and drove to the front of the store. Lawrence came out of the store and Pendleton had come back and sat in the passenger's seat. (T 111).

They went to the Knob Hill Liquor store, half a block away. (T 111) . Lawrence and Pendleton went inside and bought a bottle of liquor. They drove to some apartments across the street from the Majik Market. Pendleton got out, carrying a grocery bag, which he said contained some clothes that he needed to return to his girlfriend. He walked behind the car, then came back a few minutes later, saying his girlfriend was not home. Pendleton said "let's go get some mixer," and he and Lawrence walked across the street to the Majik Market. Pendleton was carrying the grocery bag he had said contained clothes. (T 112-114).

While Lawrence and Pendleton were in the Majik Market, Gardner sat on the hood of the car, listening to the radio. (T 113). While she was sitting there, she saw Pendleton walk towards the back of the coolers. Lawrence went back that **way,** too, though not all the way to where Pendleton had gone. After a little while, the clerk moved that way, too. Gardner was not paying much attention to the store, though, and was looking around at other things. (T 114). She could not tell what they were doing in the store. When they came out, they both walked over to the dumpster and appeared to throw something away. When they returned to the car, Pendleton was carrying what appeared to be the same grocery bag he had carried into the store. Lawrence was carrying a smaller bag and was wearing a gray-colored shirt rather than the dark blue shirt he was

wearing when he went into the store. When Gardner asked him why he changed shirts, he did not respond, He was really upset and shaking. Pendleton was emotionless. (T 114, 116).

They got back in the car, and Lawrence drove to Fort Pickens beach. Lawrence asked Gardner if she would talk to him, and they walked down to the beach. Pendleton stayed in the car. While walking to the beach, Lawrence said, "I shot the redheaded bitch." Gardner asked Lawrence what he was talking about but did not pay close attention to what he said because she thought he was tripping on cocaine. She changed the subject because he started acting really nervous and tense and turning around and throwing his hands up in the air. Lawrence said he shot her because she made him mad. They stayed on the beach until dawn, then walked back to the car, where Pendleton appeared to be passed out. Lawrence then drove Gardner home. (T 117-119).

The state introduced into evidence a certified copy of Lawrence's 1976 conviction of the second-degree murder of his wife and sentence of life in prison. (T 126). Larry Sutton, a prison inmate, testified that when he was Lawrence's cellmate at Okaloosa prison in April of 1989, Lawrence told him he strangled his wife because she was swimming with his nephew. He took her off to a place they used to go for sex. She asked him where they were going, and he told her he was going to take her out in the woods and kill her. She followed him anyway.

They sat down and he reached over and strangled her. (T 121). Lawrence told Sutton he killed his wife because she had messed around on him and had been messing around on him. Lawrence was twenty years old at the time and his wife was eighteen, (T 122). Sutton said he had been convicted of twenty or thirty felonies and was presently serving two life sentences without parole for 25 years for two first-degree murders. (T 122-123).

Elwin Coffman, who had been a Santa Rosa County sheriff in 1976, testified that some children had discovered Lawrence's wife's body in the woods sixty-six days after the murder. After the body was identified, Lawrence was questioned, and he confessed to choking her to death. (T 125).

Phil Suggs, a probation officer, testified that Lawrence was on parole for the murder of his wife when the instant offenses were committed. (T 127). Until the Majik Market shooting, Lawrence had been doing fine, although he could not find a job. (T 128).

Over defense objection, the victim's mother, Betty Criswell, was permitted to testify that her daughter was a great church worker, never missed a day of church, was 37 years old, was divorced, and had an eight-year-old son. Criswell said her daughter and her daughter's son had been living with her for some time and the boy's father had not seen his son since the divorce. Her daughter's death had quite an impact on her grandson because after her death, his father went to court

and took him to another state. When asked what impact her daughter's death had on her, Mrs. Criswell said quite a bit. She considered her grandson her baby because she had raised him all that time and now all she had was monthly visitation. (T 132-133).

The defense presented no witnesses or other evidence in mitigation. (T 134).

During closing argument, the prosecutor told the jury the process of weighing used in the justice system was very, very old, as illustrated by a story in the Bible. Over defense objection, the prosecutor was permitted to tell the story of King Belshazzar, as told in the Book of Daniel. According to the prosecutor, Belshazzar threw a big party at which wine from the city of Jerusalem was drunk and false gods were worshipped. During the party, a hand appeared out of thin air and wrote something on the wall, which no one could decipher. Finally, a young man named Daniel told Belshazzar the handwriting on the wall said, "your kingdom has been numbered and you've been weighed in the balances and found wanting." (T 147). The prosecutor urged the jurors to find that Lawrence also had been "weighed in the balances and found wanting." (T 150, 153).

During its deliberations, the jury sent the trial judge the following two questions: (1) Does "time served" get subtracted from a mandatory minimum 25 year sentence without parole?, and (2) can a "death sentence" be changed thru appeals

to a "life sentence" of 25 years without parole?" (R 19, 167-168). With counsels' agreement, the trial judge told the jurors he could not answer the questions and their job was to consider the verdict as instructed and they should not be concerned with what might happen in further proceedings. (T 168-169).

SUMMARY OF ARGUMENT

Issue I. The trial court's failure to instruct Lawrence's penalty phase jury on the definition of reasonable doubt deprived Lawrence of a reliable sentence, in violation of the eighth and fourteenth amendments of the United States Constitution, and Article I, Sections 9 and 17, of the Florida Constitution.

Issue II. The trial court committed reversible error in admitting irrelevant evidence of a collateral crime.

Issue III. The trial court reversibly erred in allowing the state to read the testimony given by Sonya Gardner at Lawrence's earlier trial, where the state's investigator located Gardner the day before trial but never served her with a subpoena, and where the trial court reversed its original ruling that Gardner was not unavailable on the ground that her testimony was relevant to the proposed mitigating circumstances.

Issue IV. The trial court reversibly erred in failing to conduct an inquiry to determine whether Lawrence's waiver of his right to present mitigating evidence was knowingly, intelligently, and voluntarily made.

Issue V. The trial court erred in refusing to grant a mistrial where during closing argument the prosecutor improperly exploited the jurors' religious beliefs by equating the jury's sentencing task to God's judgment of the wicked.

Issue VI. The trial court erred in finding the aggravating circumstance that the murder was committed for pecuniary gain where competent, unrebutted evidence showed Lawrence killed the victim because she made him mad and where the evidence **was** insufficient to prove Lawrence intended to rob the Majik Market at the time the homicide was committed.

Issue VII. The trial court applied the wrong standard in rejecting as a mitigating factor the evidence of Lawrence's cocaine use the night of the homicide.

Issue VIII. Section 941.141(7), Florida Statutes (1992), which allows victim impact evidence in the sentencing phase of a capital trial, allows for arbitrary and capricious imposition of the death penalty; is vague; infringes on this Court's exclusive right to regulate practice and procedure; and violates state and federal ex post facto provisions.

ARGUMENT

ISSUE I

THE TRIAL COURT'S FAILURE TO GIVE AN INSTRUCTION DEFINING REASONABLE DOUBT DEPRIVED LAWRENCE OF A RELIABLE PENALTY PHASE PROCEEDING, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 17, OF THE FLORIDA CONSTITUTION.

The trial judge at Lawrence's resentencing proceeding gave no instruction to the jury defining "reasonable doubt." This error vitiated the jury's recommendation of death, thereby rendering the proceeding fundamentally unfair. This Court must reverse for a new penalty phase proceeding.

In Cage v. Louisiana, 498 U.S. 39, 41, 111 S.Ct. 328, 112 L.Ed.2d 339, 342 (1990), the United States Supreme Court held invalid Louisiana's reasonable doubt instruction because it allowed the jury to reach a verdict of guilt based upon a "degree of proof below that required by the due process clause." The Court subsequently ruled harmless error **analysis** inappropriate to measure the effect the unconstitutional jury instruction in Cage might have on the jury. n v. Louisiana, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The Court grounded its decision on the fifth amendment's requirement of proof beyond **a** reasonable doubt and the sixth amendment right to a jury determination of guilt, reasoning that when the jury has received a defective reasonable doubt instruction, there is "no jury verdict within the meaning of the Sixth Amendment."

124 L.Ed.2d at 189. Harmless error analysis, however, requires the reviewing court to consider the actual effect of the error on the guilty verdict in the case at hand. Without a valid jury determination of guilt, an appellate court has "no object, so to speak, upon which harmless error scrutiny can operate." Id. at 190. A reviewing court could only engage in speculation, that is, decide what a reasonable jury would have done, and, when it does that, the wrong entity judges the defendant guilty. Id. As Justice Rehnquist observed, "a constitutionally deficient reasonable-doubt instruction is a breed apart from the many instructional errors that we have held are amenable to harmless-error analysis" because a constitutionally deficient reasonable-doubt instruction will always result in the absence of "beyond a reasonable doubt" jury findings. Id. at 193 (Rehnquist, J., concurring).

The Court reached the same result under the analysis used in Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), in which the Court divided trial errors into those which may be assessed within the context of other evidence presented and those consisting of "structural defects" which affect the framework within which the trial proceeds. Id. at 191 (Rehnquist, J., concurring). Applying this analysis, the Court concluded the jury guarantee is a "basic protection" which reflects "`a profound judgment about the way in which law should be enforced and justice administered."'

The deprivation of this right is a structural defect, therefore, and, as such, can never be harmless. Sullivan, 124 L.Ed.2d at 190-91.

In the present case, the trial court failed to provide any definition of reasonable doubt. Although the jury was told "[e]ach aggravating factor must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision" (T 164), the court never defined reasonable doubt.[2] The error in the present case, therefore, was more egregious than the error in Cage. Here, the jury was not simply misdirected as to the state's burden of proof; the jury was given no guidance as to what is meant by reasonable doubt. Although due process "does not require that any particular form of words be used in advising the jury of the government's burden of proof," Victor v. Nebraska, 114 S.Ct. 1239, 127 L.Ed.2d 583, 590 (1994), "'taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.'" Id. (quoting Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed.2d 150 (1954)); see also Esty v. State, 642 So. 2d 1074, 1080 (Fla. 1994) (standard reasonable

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[2]Instruction 2.03 of the General Instructionstothe Standard Jury Instructionsin Criminal Cases provides, in pertinent part, "A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable,"

doubt instruction upheld because taken as a whole, instruction correctly conveyed concept of reasonable doubt to jury), cert. denied, 115 U.S. 1380, 131 L.Ed.2d 234 (1995).

Counsel's failure to object at trial does not preclude review by this Court. In light of the Supreme Court's analysis in Cage, the failure to define reasonable doubt necessarily constitutes fundamental error. Fundamental error has been defined by this Court as error that "goes to the foundation of the case," Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970), error that "reaches into the very legality of the trial itself," State v. Smith, 240 So. 2d 807, 810 (Fla. 1970), or error that "amount[s] to a denial of due process." Castor v. State, 365 So. 2d 701, 704 n.7 (Fla. 1978). The United States Supreme Court has applied a similar definition:

> The question . . . is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," not merely whether "the instruction is undesirable, erroneous, or even 'universally condemmed.'"

Henderson v. Kibbe, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977) (citations omitted).

As the Supreme Court explained in Sullivan, a jury determination of guilt beyond a reasonable doubt is fundamental to a fair trial. Because an inadequate description of the burden of proof "vitiates all the jury's findings," Sullivan, 124 L.Ed.2d at 190, a defective reasonable doubt instruction amounts to a structural defect, not amenable to harmless error analysis,

and, by implication, fundamental error as that term has been defined both by this Court and the United States Supreme Court.

This analysis applies with full force where, as here, the trial court has failed to define reasonable doubt to a jury charged with rendering an advisory opinion as to whether a defendant should be sentenced to death. This Court has long recognized the jury's integral role in Florida's death sentencing process. Pangburn v. State, 20 Fla. L. Weekly S323, S325 (Fla. July 6, 1995) (right to jury in penalty phase proceeding is "substantial right"); Riley v. Wainwright, 517 So. 2d 656, 657 (Fla. 1987)("sentencing jury's recommendation is an integral part of the death sentencing process"); Lamadline v. State, 303 So. 2d 17, 20 (Fla. 1974)(right to sentencing jury is "an essential right of the defendant under our death penalty legislation"). Indeed, a capital defendant's right to an advisory opinion from a jury is so critical to Florida's capital sentencing scheme that waiver of this right cannot be presumed from a silent record. See Lamadline, 303 So. 2d at 20.

Furthermore, the concept of reasonable doubt is as essential to the jury's advisory verdict as to whether the death penalty is appropriate as it is to the jury's determination of guilt or innocence. The death penalty may not be imposed absent proof beyond a reasonable doubt of at least one statutory aggravating circumstance. State v. Dsxon, 283

so. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Accordingly, "the aggravating circumstances . . . [are] like elements of a capital felony in that the state must establish them." Aranso v. State, 411 So. 2d 172, 174 (Fla.), cert. denied, 457 U.S. 1140, 102 S.Ct. 2973, 73 L.Ed.2d 1360 (1982); see also Spaziano v. Florida, 468 U.S. 447, 483, 104 S.Ct. 3154, 82 L.Ed.2d 340, 367 (1984) ("In many respects, capital sentencing resembles a trial on the question of guilt, involving as it does, a prescribed burden of proof of given elements through the adversarial process.") (Stevens, J., dissenting).

In addition, the proven aggravating circumstances must outweigh any mitigating circumstances. See Aranso, 411 So. 2d at 474. And, although each element of the aggravating factors must be proved beyond a reasonable doubt, Banda v. State, 536 So. 2d 221, 224 (Fla. 1988), cert. denied, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989), mitigating factors need be proven only by the greater weight of the evidence. Campbell v. State, 571 So. 2d 415 (Fla. 1990). Because the jury must apply two different burdens of proof in reaching its advisory verdict, it becomes even more critical that the instructions "correctly conve[y] the concept of reasonable doubt to the jury." See Victor v. Nebraska, 127 L.Ed.2d at 590.

The trial court's failure to define reasonable doubt deprived Lawrence of a valid advisory jury recommendation as to

his sentence. This defect rendered Lawrence's penalty phase proceeding fundamentally unfair, in violation of the eighth and fourteenth amendments of the United States Constitution and Article I, sections 9 and 17, of the Florida Constitution. Accordingly, this Court should vacate Lawrence's death sentence and remand for a new sentencing proceeding.

ISSUE II

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT EVIDENCE OF A COLLATERAL CRIME DURING THE PENALTY PHASE OF APPELLANT'S TRIAL.

During the state's direct examination of Georgia Crowell, the prosecutor asked Crowell if Lawrence said anything to her in early October of 1986 about an attempted robbery. Over Lawrence's objection and motion for mistrial, Crowell was permitted to testify that Lawrence told her he went to the Majik Market intending to rob the store but could not do it after looking at the clerk. (T 94-96). The presentation of this irrelevant evidence of a collateral crime to the jury violated Lawrence's rights under the fifth, sixth, and fourteenth amendments of the United States Constitution, and Article I, sections 9, 16, and 17, of the Florida Constitution.

The Florida Evidence Code provides that relevant evidence is admissible and, by implication, that irrelevant evidence is inadmissible. s. 90.402, Fla. Stat. (1993). Relevant evidence is defined by statute as "evidence tending to prove or disprove a material fact." s. 90.401, Fla. Stat, (1993). "When evidence is offered to prove a fact which is not a matter in issue, it is said to be immaterial," and, hence, is not admissible. Ehrhardt, Florida Evidence, s. 401.1 (1994 Edition). As one court has explained,

> Relevancy is founded on materiality, the nexus between a fact being proved and a disputed issue, and probativeness, the effect this evidence would have on the

existence of that fact.

Barrett v. State, 605 So. 2d 560, 561 (Fla. 4th DCA 1992).

While the rules of evidence are relaxed somewhat in penalty phase proceedings, evidence that is irrelevant to the aggravating and mitigating factors pending before the jury is still inadmissible. s. 921.141(1), Fla. Stat. (1993). The Court affirmed this basic principle in Derrick v. State, 581 So. 2d 31 (Fla. 1991), holding that evidence the defendant had told someone he would kill again was inadmissible as it was not relevant to any statutory aggravating circumstances surrounding the murder. The Court said:

> We agree with Derrick that James's testimony was erroneously admitted and constitutes reversible error. The statement was not relevant to show Derrick's guilt because guilt is not at issue in the penalty phase of a trial. Therefore, the state must show that the statement is relevant to an issue properly considered in the penalty phase. . . . The testimony was not relevant to any . . . aggravating factor.

Id. at 36; accord Floyd v. State, 569 So. 2d **1225** (Fla. 1990) ("To be admissible in the penalty phase, state evidence must relate to any of the aggravating circumstances), cert. denied, 501 U.S. 1259, 111 S.Ct. 2912, 115 L.Ed.2d 1075 (1991).

Here, the evidence concerning the alleged attempted robbery did not relate to any aggravating factors and therefore was not relevant to any issue the jury **was** called to decide. In fact, the state's theory below was that the testimony was

relevant to prove Lawrence guilty of the murder. The jury was told, however, that Lawrence had been convicted of both the robbery and murder, and, hence, his guilt of those crimes was not at issue. Furthermore, that Lawrence told someone he once planned to rob the Majik Market but abandoned the attempt does not logically go to prove that he committed the murder. The connection between Crowell's testimony about the alleged attempted robbery and the murder is tenuous, at best.

The admission of Crowell's testimony regarding the alleged attempted robbery, a crime for which no conviction had been obtained, constituted inadmissible nonstatutory aggravation. See Provence v. State, 337 So. 2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). This testimony therefore should have been excluded. The introduction before the jury of this irrelevant evidence tainted the jury's penalty recommendation. See Trawick v. State, 473 So. 2d 1235, 1240 (Fla. 1985), cert. denied, 476 U.S. 1143, 106 S.Ct. 2254, 90 L.Ed.2d 699 (1986). A new penalty phase, without the inadmissible evidence, is required.

ISSUE III:

THE TRIAL COURT REVERSIBLY ERRED IN ALLOWING THE PROSECUTOR TO READ THE TESTIMONY GIVEN BY SONYA GARDNER AT LAWRENCE'S PRIOR TRIAL WHERE THE STATE DID NOT DEMONSTRATE HER UNAVAILABILITY.

The former testimony of a witness is admissible only if the witness who testified at the earlier trial is unavailable to testify at the later proceeding. ss. 90.804(1), (2) (a), Fla. Stat. (1993); Thompson v. State, 619 So. 2d 261 (Fla.), cert. denied, 114 S.Ct. 445, 126 L.Ed.2d 378 (1993); McClain v. State, 411 So. 2d 316 (Fla. 3d DCA 1982). The burden of showing the unavailability of the witness is on the party who seeks to use the former testimony. Jackson v. State, 575 so. 2d 181, 187 (Fla. 1991). While the rules of evidence are relaxed somewhat in penalty phase proceedings, the rule requiring a party to demonstrate a witness's unavailability before introducing her prior testimony has been held applicable to penalty phase proceedings. Hitchcock v. State, 578 So. 2d 685, 690 (Fla. 1990), cert. granted an&judgment vacated on gther grounds, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992).

In the present case, the trial court allowed the state to read to the jury the testimony given by Sonya Gardner at Lawrence's prior trial. Although the trial court initially ruled the state had failed to demonstrate Gardner's unavailability, the court later decided to allow her former testimony, despite Lawrence's objection, on the ground the testimony might

be relevant to one of the statutory mitigating factors. The judge's initial ruling was correct; his subsequent decision to allow the hearsay testimony was error. Even if the evidence were relevant,[3] Gardner's former testimony was inadmissible because the state failed to demonstrate Gardner's unavailability. This error deprived Lawrence of his right of confrontation and requires reversal for a new penalty phase proceeding.

Section 90.804(1)(e) provides that a witness may be declared unavailable if the witness "[i]s absent from the hearing, and the proponent of [the witness's] statement has been unable to procure [the witness's] attendance or testimony by process or other reasonable means." The record shows the state's investigator, Tom Tucker, located Gardner the weekend before trial at a state park campground. Although gardner initially told Tucker she would voluntarily appear on Monday morning, she did not show up. She telephoned Tucker that afternoon and said she did not want to leave her camping equipment. She also said she did not want to have anything to do with the trial and was scared of people in the area. A few hours later, Gardner's boyfriend called Tucker and said Gardner would come only if she was forced. The boyfriend agreed to direct Tucker to their campsite if Gardner's testimony were required. Tucker told the boyfriend he would call back if

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[3]The state conceded the testimony was not relevant to any statutory aggravating factors. (T 71).

there was no way around Gardner's testifying Tucker never called back.

It is obvious the state did not exhaust its efforts to obtain Gardner's presence. Gardner had been located in a nearby county, and, although she would not testify voluntarily, she agreed to direct the authorities to her location if her presence were required. The state could have subpoenaed Gardner and, if necessary, enforced the subpoena. The trial court's initial ruling disallowing Gardner's former testimony was correct.

Inexplicably, however, after the state presented its other witnesses, the judge decided sua sponte to allow the prosecutor to read Gardner's former testimony to the jury. The reason for the court's reversal was that since Gardner was with Lawrence the night the murder was committed, her testimony might be relevant to the proposed mitigating circumstance that the crime was committed while Lawrence was under the influence of extreme mental or emotional distress. During a break in the testimony, the court announced:

> On reflection, unless I somehow manage to get her in here, I think I am willing to change my ruling about Sonya Gardner's availability. I am concerned about relevance. One of the things that occurred to me and, Mr. Dees, I know that one of the mitigating factors you have just touched on it, I think one of the mitigating factors you may argue may have to do with whether the defendant acted under extreme mental or emotional distress or stress and if, in fact, she was with the defendant on the

> night of the killing, she may be able -- I don't know what her -- I don't know if her testimony speaks to that.
>
> I would be more inclined to all -- unless you are going to announce that you're not going to argue that as a mitigator, Mr. Dees, I would be more inclined to allow that than a great deal of facts about who did what with guns afterwards. I don't really think that speaks to any of the aggravating factors or mitigators.

(T 105-106). After this announcement, and over Lawrence's renewed objection, the trial judge ruled the prosecutor could read to the jury Gardner's former testimony "about what she saw and heard right around the time of the murder. . . . particularly if it deals with [Lawrence's] demeanor or state of mind." (T 106-107).

The trial judge erred in admitting the prior testimony simply because he deemed it relevant to the proposed mitigating circumstances. A witness's unavailability is an absolute prerequisite to the use of the witness's prior testimony under section 90.804. See Hitchcock, 578 So. 2d at 690-91; Ehrhardt, Florida Evidence s. 804.1 ("If the declarant is available to testify during the trial, evidence of a hearsay statement is not admissible under any of the section 90.804 exceptions even though all the other statutory requirements are met").

The error in admitting Gardner's prior testimony was not harmless. As one court summarized:

> There is a clear constitutional preference for in-court confrontation of witnesses. U.S. Const. amend. VI; Ohio v. Roberts, 448 U.S. 56, 65, 100 S.Ct. 2531, 2537, 65

> L.Ed.2d 597, 607 (1978); Art. I, s. 16, Fla. Const.; State v. Dolen, 390 So. 2d 407 (Fla. 5th DCA 1980). The purpose of the confrontation clause is to afford an accused the fundamental right to compel a witness "to stand face to face with the jury [or trier of fact1 in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Barber v. Page, 390 U.S 719, 721, 88 S.Ct. 1318, 1320, 20 L.Ed.2d 255, 258 (1968).

Palmieri v. State, 411 So. 2d 985, 986 (Fla. 3d DCA 1982).

Here, the state emphasized Gardner's former testimony in closing argument, suggesting that even if Lawrence were using cocaine that night, it did not affect his behavior:

> The only thing in mitigation you have heard is that he was using cocaine. But remember this. The testimony that was read to you that mentioned that he was using cocaine, it also said he drove the car from Milton to the Majik Market in Pensacola. He pumped gas into the car at the Majik Market. He drove the car to Fort Pickens. He walked on the beach with the girl, Sonya Gardner. And that's when he confessed to her that he shot the lady, and his own words was I shot the redheaded bitch, that's what he said, because she made me mad.

(T 151). The state made the same argument in its sentencing memorandum to the judge:

> Although there was evidence that defendant had been using cocaine at the time of the murder, there was no evidence that he was "substantially impaired." He drove the car to and from the scene, at night, and he talked to Sonya Gardner about what he had done.

(R 23). The trial judge relied on Gardner's prior testimony in

rejecting the mitigating circumstance of substantial impairment:

> A witness who was with the defendant thought his behavior after the killing (of which she was unaware at the time) suggested he was "tripping" on cocaine, This **same** witness was not so troubled by the defendant's behavior either before or after the killing that she expressed any concern about riding considerable distances in an automobile driven by the defendant.

(SR 89).

In addition, Gardner's prior testimony was inadmissible because it was given in the guilt phase of Lawrence's earlier trial, where the issues were different from those here. See Thompson, 619 So. 2d at 265 (even if original witness is unavailable, use of prior testimony allowed only if issues in prior case are similar to those in case at hand). Because Lawrence's guilt **was** not an issue here, Lawrence might have taken a completely different approach in cross-examining Gardner, had he been given the opportunity, from the strategy used at the earlier trial.

The admission of Gardner's prior testimony was prejudicial error, requiring remand for a new penalty phase proceeding.

ISSUE IV

THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO CONDUCT A KOON INQUIRY TO DETERMINE WHETHER LAWRENCE'S WAIVER OF HIS RIGHT TO PRESENT MITIGATING EVIDENCE WAS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY MADE.

A capital defendant has a constitutional right to present mitigating evidence in his or her capital sentencing proceeding. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 1824, 95 L.Ed.2d 347 (1987); Skipper v. South Carolina, 476 U.S. 1, 8-9, 106 S.Ct. 1669, 1673, 90 L.Ed.2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 113-14, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982). As this Court said recently, a defendant's "rights to testify and call [penalty phase] witnesses are fundamental rights under cur state and federal constitutions." Deaton v. Dugger, 635 So. 2d 4, 8 (Fla. 1993), cert. denied, 115 S.Ct. 263, 130 L.Ed.2d 182 (1994).

Although a death penalty defendant may waive his or her right to present mitigating witnesses, see, e.g., Clark State, 613 So. 2d 412 (Fla. 1992), cert. denied, 114 S.Ct. 114, 126 L.Ed.2d 79 (1993); Hamblen v. State, 527 So. 2d 800 (Fla. 1988), such waiver must be knowingly, intelligently, and voluntarily made. Deaton, 635 So. 2d at 8; Koon v. Dusser, 619 So. 2d 246, 250 (Fla. 1993); Durocher v. State, 604 So. 2d 810, 812 (Fla. 1992), cert. denied, 113 S.Ct. 1660, 123 L.Ed.2d 279 (1993); Pettit v. State, 591 So, 2d 618, 620 (Fla.), cert. denied, 113 S.Ct. 110, 121 L.Ed.2d 68 (1992); Henry v. State,

586 So. 2d 1033, 1037-38 (Fla. 1991), revised on remand from the United States Suwreme Court, 613 So. 2d 429, 433 (Fla. 1992), cert. denied, 114 S.Ct. 699, 126 L.Ed.2d 665 (1994); Ardenied v. State, 574 So. 2d 87, 94 (Fla. 1991), cert. , 112 S.Ct. 114, 116 L.Ed.2d 83 (1991). Furthermore, a valid waiver may not be presumed from a silent record. There must be an affirmative showing that the defendant understood what he was giving up by waiving the presence of mitigating evidence. Deaton, 635 So. 2d at 8; Koon, 619 So. 2d at 250; Durocher, 604 So. 2d at 812.

In the present case, at the close of the state's case, defense counsel announced that Lawrence would present no evidence in mitigation. The trial judge, although startled at this announcement,[4] made no inquiry to determine (a) whether counsel's failure to present mitigation was at the behest of his client; (b) if so, whether counsel's investigation had revealed mitigation and what that mitagation was; and (c) whether counsel had discussed these matters with Lawrence, and, if so, whether Lawrence still wished to waive the presentation of mitigating evidence. Under this Court's decisions in Durocher, Deaton, and Koon, the trial court's failure to conduct such an inquiry was reversible error.

Prior to Koon, this Court was faced in several cases with claims related to the defendant's waiver of mitigating evi-

[4]The trial judge told defense counsel, "You caught me by surprise." (T 134).

dence. In Anderson, defense counsel announced he had uncovered many witnesses who could testify favorable to Anderson during the penalty phase, but Anderson had forbidden him to call any of these witnesses. Defense counsel listed the names of these potential witnesses, which included family members and friends, correctional officers, and employers and employees of Anderson. In response to inquiry by the court, Anderson said he concurred with everything defense counsel had said, that he did not want any witnesses called on his behalf, and that he was not on any kind of drugs or medication that would affect his ability to understand the proceedings that day. 574 so. 2d at 94-95.

On appeal, Anderson contended his waiver of mitigating evidence amounted to a waiver of effective assistance of counsel, and that the trial court erred in failing to conduct an inquiry on the record under Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), to determine whether Anderson's waiver was knowing, intelligent, and voluntary. Id. at 95. Anderson contended, in the alternative, that the trial court was required under Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938), to determine whether his waiver was knowing, intelligent, and voluntary. This Court rejected this argument, stating that "Faretta and Johnson do not apply to the situation before us and "the trial court had no obligation to conduct a Faretta inquiry since Anderson was represented by counsel." 574 so. 2d at 95. In a concurring

opinion joined by Justices Shaw and Kogan, Justice Erhlich stated:

> I am apprehensive that the majority opinion may be construed to mean that no inquiry need be made where a death penalty defendant waives his right to present mitigating witnesses. I am of the view that an inquiry must be made by the court to satisfy the trial judge that the waiver is knowingly, intelligently and voluntarily made. While the colloquy that was had here could have been expanded upon to include further inquiry as to the likely consequences of the defendant's waiver, I am satisfied that it was sufficient to meet any constitutional requirement, and for this reason, I concur in the Court's opinion.

Id. (Ehrlich, J., concurring).

In a concurring and dissenting opinion, Justice Barkett agreed that Faretta was inapplicable but concluded "as a matter of constitutional law that a judicial inquiry was required to protect Anderson's constitutional rights, and that the inquiry in Anderson's case failed to satisfy that requirement." Justice Barkett pointed out that the decision to waive mitigation is no less significant than the decision to plead guilty, and the same standard for waiver of a guilty plea, that is, an affirmative showing that the waiver was intelligent and voluntary, see Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), should apply to a defendant's waiver of mitigating evidence. 574 so. 2d at 96-97. (Barkett, J. dissenting).

After Anderson, the defendants in Durocher, Clark, and

Henry similarly argued that the trial court had erred in allowing them to waive the presentation of mitigating circumstances. This Court rejected each of these claims, concluding the record showed the defendants had knowingly and voluntarily waived their right to present mitigating evidence. Henry, 613 So. 2d at 433; Clark, 613 So. 2d at 414; Durocher, 604 So. 2d at 812.

Next, in Koon, a post-conviction appeal, the defendant argued his trial counsel was ineffective in failing to investigate and present mitigating evidence. In rejecting this claim, the Court noted that although defense counsel did not present any penalty phase evidence because Koon had instructed him not to do so, counsel had investigated potential mitigating evidence and had talked with Koon about presenting penalty phase witnesses. The Court found no error in counsel's following Koon's instruction not to present mitigating evidence, 619 So. 2d at 250.

The Court recognized, however, "the problems inherent in a trial record that does not adequately reflect a defendant's waiver of his right to present any mitigating evidence," and therefore established a new rule to be applied "in such a situation":

> When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision, Counsel must indicate whether, based on his

> investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

Id.

In Deaton, which, like Koon, involved a post-conviction appeal, the trial court set aside Deaton's death sentence, finding the defendant was not given the opportunity to knowingly and intelligently make the decision as to whether or not to testify or to call witnesses. 635 So. 2d at 8. This Court upheld the trial court's ruling, stating:

> In this case, the trial judge found that Deaton had waived the right to testify and the right to call witnesses to present evidence in mitigation, but concluded that, because his counsel failed to adequately investigate mitigation, Deaton's waiver of those rights was not knowing, voluntary, and intelligent. The rights to testify and call witnesses are fundamental rights under our state and federal constitutions. Although we have held that a trial court need not necessarily conduct a Faretta type inquiry in determining the validity of any waiver of those rights to present mitigating evidence, clearly, the record must support a finding that such a waiver was knowingly, voluntarily, and intelligently made.

Id. (citations and footnotes omitted) (emphasis added). The Court concluded that "counsel's shortcomings were sufficiently serious to have deprived Deaton of a reliable penalty phase." Id. at 9.

Koon therefore established a constitutional rule devised to ensure the validity of a defendant's waiver of the right to present mitigating evidence in the penalty phase of a capital case. In order for a waiver to be knowing and intelligent: 1) the defendant must be informed on the record of what the mitigating evidence is, and 2) the defendant must confirm on the record that he is giving up his right to present such evidence. Koon places the responsibility for obtaining a valid waiver squarely on the trial judge.

In the present case, the record is silent as to whether Lawrence's waiver of his constitutional right to present mitigating evidence was knowing and voluntary. Although defense counsel here did not affirmatively state he had been ordered by Lawrence not to present any penalty phase witnesses, the reasons underlying the Koon rule compel its application to this situation. Koon was concerned primarily with "the problems inherent in a trial record that does not adequately reflect a defendant's waiver of his right to present mitigating evidence." 619 So. 2d at 250. Requiring an on-the-record inquiry clearly "forestalls the spin-off of collateral proceedings that seek to probe murky memories." See Boykin v. Ala--, 395 U.S. at 244. Furthermore, rarely, if ever, does a defendant decide not to present mitigating evidence as a matter of tactical choice, particularly in a resentencing proceeding, as here, where lingering doubt is no longer a viable penalty

phase strategy. The trial court erred in failing to conduct the inquiry established in Koon. Because a valid waiver cannot be presumed from a silent record, this Court must reverse Lawrence's death sentence and remand for a new penalty phase proceeding.

ISSUE V

THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL WHERE DURING CLOSING ARGUMENT THE PROSECUTOR EXHORTED THE JURY TO SENTENCE LAWRENCE TO DEATH BY EQUATING THE JURY'S SENTENCING TASK TO GOD'S JUDGMENT OF THE WICKED.

During closing argument, the prosecutor told the jury the story of Daniel and the Babylonian king, Belshazzar, as recorded in the Bible. According to the prosecutor's rendition of the story, Belshazzar was hosting a big party for his lords, at which everyone was drinking wine "from the house of God in Jerusalem" and worshipping false gods. Belshazzar received a message from God in the form of some handwriting on the wall, which Daniel translated as stating: "[Y]our kingdom has been numbered and you've been weighed in the balances and found wanting." (T 147). This Biblical story became the centerpiece of the prosecutor's argument, as he repeatedly urged the jurors to find that Michael Lawrence had "been weighed in the balances and found wanting." (T 150, 153). An appeal to religious beliefs has no place in penalty phase proceedings. The prosecutor's improper argument warrants reversal for a new sentencing proceeding.

This Court has long condemned prosecutorial arguments that appeal to emotion rather than reason, particularly in death penalty cases. "The purpose of the death penalty statute as now drafted is to insulate its application from emotionalism and caprice." Bush v. State, 461 So. 2d 936, 942 (Fla.

1984) (Ehrlich, J., specially concurring), cert. denied, 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986). Closing arguments "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985).

This Court has not hesitated to reverse a death sentence based upon prosecutorial misconduct during penalty phase proceedings. In King v. State, 623 So. 2d 486, 488 (Fla. 1993), for example, the prosecutor gave a dissertation on evil, which King argued amounted to admonishing the jurors that "they would be cooperating with evil and would themselves be involved in evil just like" King if they recommended life imprisonment. This Court agreed with King that the prosecutor went too far with this argument and remanded for a new sentencing proceeding before a jury. Id. at 488-89. Similarly, in Garron v. State, 528 So. 2d 353, 359 (Fla. 1988), the prosecutor made a "Golden Rule" argument," and several times misstated the applicable law. This Court held the remarks justified a new penalty proceeding, even though curative instructions had been given to the jury as to each of the improper comments. Id.

Here, the prosecutor improperly exploited the jurors' piety by equating the jury's task of weighing aggravating and mitigating factors to God's judgment of Belshazzar. Although referring to the Bible is not, in itself, grounds for reversal,

Paramore v. State, 229 So. 2d 855, 860-61 (Fla. 1969), vacated in part on other mounds, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972), Biblical references can be so prejudicial in the context of a particular case as to require reversal. " [T]he rule against inflammatory and abusive argument by a state's attorney is clear, each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements are made." Bush, 461 So. 2d at 941; Darden v. State, 329 So. 2d 287, 291 (Fla. 1976), cert. denied, 429 U.S. 917, 97 S.Ct. 308, 50 L.Ed.2d 282 (1976).

For example, in Meade v. State, 431 So. 2d 1031 (Fla. 4th DCA 1983), review denied, 441 So. 2d 633 (Fla. 1983), the court reversed Meade's conviction of manslaughter based upon the following argument by the prosecutor:

> There, ladies and gentlement, is a man who forgot the fifth commandment, which was codified in the laws of the State of Florida against murder: Thou shalt not kill.

Id. at 1031. In reversing Meade's conviction, the court pointed out the prosecutor had not confined himself to merely quoting Biblical passages or referring to principles of divine law as illustrations. Rather, "[b]y identifying the Florida statute on murder with the Fifth Commandment, the state could have conveyed to the jury that all killing is against the law, when in fact under certain circumstances killing is excused." Id. at 1033.

Here, too, the prosecutor did more than simply refer to a Biblical passage. The story of Daniel was the theme of the prosecutor's closing argument. After telling the story in some detail, the prosecutor told the jury Michael Lawrence, too, "has been weighed in the balance and found wanting." The prosecutor also referred to another Biblical story, telling the jury that Isaiah the prophet said God weighed the nations and found they were "nothing more than a small dust of the balance." (T 148-149). He revisited this theme as well. (T 150, 152).

The prosecutor's use of the Bible was obviously calculated to exploit the jurors' religious beliefs. Religious beliefs are grounded on faith, hope, and fear, not reason, and appeals to religious beliefs consequently, have no place in closing arguments. When "comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument." Garron, 528 So. 2d at 359. Here, the prosecutor's argument suggesting to the jury that since God had not hesitated to condemn Belshazzar, they should not hesitate to condemn Lawrence, injected an unquantifiable element of religious fervor into the jury's deliberations. Therefore, it cannot be said beyond a reasonable doubt that the improper argument did not affect the jury's deliberations. See State v. DeGuilio, 491 so. 2d 1129 (Fla. 1986). This Court must reverse

for a new sentencing proceeding.

ISSUE VI

THE EVIDENCE IS INSUFFICIENT TO PROVE THE AGGRAVATING FACTOR THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN.

In finding the aggravating circumstance of pecuniary gain, the trial judge stated,

> The defendant was convicted of robbery with a firearm, and that conviction was affirmed by the Supreme Court. Lawrence v. State, supra at 1097. The defendant now argues, relying on Clark v. State, 609 So. 2d 513 (Fla. 1992), that the evidence supporting this aggravating factor is circumstantial, and that it is possible the taking of cash from the register **was** merely an afterthought. This **case** bears no resemblance to Clark, in which property belonging to the victim was taken after the killing. Clark involved a motive distinct from robbery, and the **facts** of the murder suggested robbery **was** not the motive. Nothing suggests anything other than robbery was behind this murder. The fact that the victim was taken to a storeroom before the shooting belies Lawrence's contention that the killing may have been in response to an argument (a contention supported by nothing but conjecture, apart from testimony by another store patron that the clerk had been rude to him). The clerk **was** shot twice in the top of the head and the register emptied. Any conclusion other than robbery as a motive for this murder strains credulity beyond the breaking point. This aggravating factor **was** established beyond a reasonable doubt.

(SR 88).

In order to sustain the pecuniary gain aggravating factor, it is not sufficient to show that property or money was taken incidental to the homicide; rather, the state must prove beyond a reasonable doubt that the murder itself was motivated by a

desire to obtain money, property, or other financial gain. Clark v. State, 609 So. 2d 513 (Fla. 1993); Hill v. State, 549 so. 2d 179 (Fla. 1989); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); P a r k e r , 458 So. 2d 750, 754 (Fla. 1984), cert denied, 470 U.S. 1088, 105 S.Ct. 1855, 85 L.Ed.2d 152 (1985); Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982). Where the evidence did not show that the defendant "possessed the requisite intent to deprive the victim of her property at the time of the murder," this Court struck a finding that a homicide occurred during the commission of a robbery. Rhodes, 547 so. 2d at 1207. Similarly, where the circumstantial evidence fails to prove that the taking of money or property was a primary motive for the homicide, or fails to prove that the taking "was anything but an afterthought," Clark, 609 So. 2d at 515, neither a finding of the robbery aggravator, Parker; Clark, nor the financial gain aggravator, Simmons; Hill, can be sustained. The financial gain aggravator is invalid unless there is "sufficient evidence to prove a pecuniary motivation for the murder itself beyond a reasonable doubt. Such proof cannot be supplied by inference from the circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance." Simmons, 419 So. 2d at 318 (emphasis added); see Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992); Hill, ., 549 So. 2d at 183; Eutzy v. State, 458 So. 2d 755, 757-58 (Fla. 1984), cert.

denied, 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985).

Here, the state relied entirely on circumstantial evidence to prove the homicide was committed for pecuniary gain.[5] Thus, the state's evidence must be inconsistent with any reasonable hypothesis that might negate the aggravating factor. Geralds; Eutzy; Simmons. This burden has not been met as the evidence was entirely consistent with the reasonable hypothesis that the homicide was motivated by anger and the money from the cash register taken as an afterthought.

The state introduced no evidence of a pecuniary motive that pre-existed or was even concurrent with the killing. The only evidence that a robbery occurred was the open and empty cash register drawer and the later-discovered shortfall of $58. Sonya Gardner, who was with Lawrence and Pendleton the night of the murder, said they drove from Milton to Pensacola and purchased gas at the Majik Market. Then they went to a liquor store down the road and bought whiskey. After stopping at Pendleton's girlfriend's apartment, it was Pendleton who suggested going back to the Majik Market to get mixes for the whiskey, and it was Pendleton who entered the store carrying a grocery bag. There was no clear evidence either Lawrence or Pendelton intended to rob the store until after the clerk was killed.

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[5]The state expressly waived the aggravating circumstance of committed during a robbery, and the jury was not instructed on this factor. (T 139, 162-163).

There is evidence, on the other hand, that Lawrence may have killed the clerk during a cocaine-induced rage. Lawrence told Gardner he was doing cocaine that night; he later told Melvin Summerlin he was so strung out on cocaine he did not remember what happened that night. And, shortly after the murder, Lawrence told Gardner he killed the clerk "because she made him mad."

The trial judge rejected the theory that the homicide was motivated by anger or erupted from an argument based on the "fact that the victim **was** taken to a storeroom before the shooting." (SR 88). This clearly was error as there was no evidence Lawrence took the clerk back to the storeroom before he shot her. See Lawrence, 614 So. 2d at 1096 (vacating kidnapping conviction because no evidence Lawrence forced victim into storeroom where her body was found) . The only evidence on this point, Gardner's testimony, indicated the clerk walked back towards the storeroom on her own, after both Pendleton and Lawrence had walked towards the back of the store. The evidence therefore is not inconsistent with the hypothesis that Lawrence (or Pendleton) did not form the intent to steal from the Majik Market until after the homicide.

Because elimination of this unproven aggravating circumstance leaves only two others, both based upon the same factual circumstance, and because the jury heard evidence of several statutory and nonstatutory mitigating circumstances, the state

cannot show beyond a reasonable doubt that consideration of the invalid aggravator did not contribute to the jury's recommendation or to the judge's imposition of a death sentence. See Espinosa v. Florida, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1989). Accordingly, this error requires remand for resentencing before a newly impaneled jury.

ISSUE VII

THE TRIAL COURT APPLIED THE WRONG STANDARD IN REJECTING AS A NONSTATUTORY MITIGATING CIRCUMSTANCE LAWRENCE'S COCAINE USE THE NIGHT OF THE MURDER.

The trial court recognized the evidence of Lawrence's cocaine use the night of the offense but rejected this evidence as a mitigating factor because of the lack of evidence that Lawrence's cocaine use supported a finding that he was under the influence of a mental or emotional disturbance or that his capacity to understand or control his actions was substantially impaired. The court rejected both statutory mental mitigators, stating:

> 1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> No expert testimony was presented on this issue. The defendant did tell others that he was taking cocaine on the night of the killing and that he killed the clerk because she made him angry. A witness described the defendant as "really upset and shaking" after the killing. None of the witnesses who were with the defendant on the night of the killing described him as being extremely upset or impaired.
>
> No evidence suggests the defendant knew the victim or that he had any reason to feel threatened by the victim in any way. Even if, as the defense has suggested (without any direct evidence), the victim was rude to the defendant, no evidence supports an inference that the defendant was under the influence of extreme emotional or mental disturbance at the time of the killing.
>
> 2. The capacity of the defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, was substantially impaired.

> The only evidence cited in support of this contention is the defendant's use of cocaine on the night in question. A witness who was with the defendant thought his behavior after the kiling (of which she was unaware at the time) suggested he was "tripping" on cocaine. This **same** witness was not so troubled by the defendant's behavior either before or after the killing that she expressed any concern about riding considerable distances in an automobile driven by the defendant. The defendant later told another witness he could not remember what happened at the store because he **was** using cocaine. No expert testimony was presented on this issue.
>
> The method and manner of the killing indicate the defendant was quite **aware** of the criminality of his conduct. The **victim** was shot in a back room of the store, with two shots to the top of the head. Lawrence fled the scene immediately and was described by witness Gardner as "acting real nervous and tense" after the murder. As in Cook v. State 542 So. 2d 964 (Fla. 1989), Lawrence's **actions** both before and after the killing are positive evidence that his mental capacity **was** not severely diminished on the night of this crime. The defendant's inhibitions **may well** have been somewhat suppressed by his use of cocaine, but no evidence supports a conclusion that his capacity to understand the import of his actions or to control his actions was substantially impaired. The court is not reasonably convinced that this mitigating circumstance exists.

(SR 89-90).

Addressing Lawrence's cocaine use as a nonstatutory mitigating factor, the court said:

> The defendant has requested the court to consider no non-statutory mitigating circumstances except to request the court to consider mental and emotional disturbance as a non-statutory factor if the court found the evidence did not support a

> finding of extreme mental or emotional disturbance. The evidence of any mental or emotional disturbance, apart from the effects of cocaine usage on the night in question, is slight. Although Lawrence's use of cocaine may have contributed in some way to his commission of this murder, the evidence does not support a conclusion that it had any substantial effect. The court finds, in the alternative, that this non-statutory mitigating factor has not been proved, or that, if it were to be considered at all, it is not entitled to substantial weight.

(SR 90). In essence, the trial court's ruling was that cocaine use on the day of the offense is not a mitigating circumstance unless it results in behavior that is the equivalent of a "mental or emotional disturbance." This clearly is not true. Drug or alcohol intoxication repeatedly has been considered by this Court to mitigate a killing without reference to statutory mitigating factors. Fead v. State, 512 So. 2d 176, 178 (Fla. 1987); Norris v. State, 429 So. 2d 688, 690 (Fla. 1983); Buckrem v. State, 355 So. 2d 111, 113-14 (Fla. 1978).

Here, although the trial court recognized Lawrence's "inhibitions may well have been somewhat suppressed by his use of cocaine," the court did not consider his cocaine use as a mitigating factor apart from the question of whether the cocaine use produced a mental or emotional disturbance. Furthermore, there is nothing in the record to support the trial judge's assumption that a person high on cocaine would not be able to drive. In Caruso v. State, 645 So. 2d 389, 396 (Fla. 1994), a forensic psychologist testified that people who

use crack cocaine experience a "quality of bizarreness" that overcomes thinking much more than with alcohol. They become emotionally disturbed, do not act as they normally would, become "almost totally disinhibited," and take "stupid high risks," often of a criminal nature. Id. According to Gardner's testimony, Lawrence's behavior on the beach was quite bizarre, bizarre enough for Gardner to conclude Lawrence was "tripping" on cocaine,

The trial court used the wrong standard in rejecting the evidence of cocaine use as a mitigating factor. Eddinss v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). In Eddings, the defendant's family history, which included beatings, was rejected as being mitigating on the ground that it was not connected to the murder, that is, that it did not tend to prove a legal excuse from criminal responsibility. 102 S.Ct. at 876. The Supreme Court held that the trial judge used the wrong standard in rejecting family history as a mitigating factor. Id.; see also Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (aspects of defendant's background are mitigating). In other words, it is not necessary that the family history be the cause for the killing to be mitigating. Like the Supreme Court in Eddings, this Court also has recognized it is reversible error for the trial court to reject a mitigating factor on the basis of utilization of a wrong standard. See Mines v. State, 390 So. 2d 332, 337 (Fla.

1980) (trial court improperly used "sanity" standard in rejecting mental mitigator of being under exterme mental or emotional disturbance), cert. denied, 451 U.S. 916, 101 S.Ct. 1994, 68 L.Ed.2d 308 (1981); Campbell v. State, 571 so. 2d 415, 418-19 (Fla. 1990) (trial court improperly used "sanity" standard in rejecting "impaired capacity" as a mitigator); Ferguson v. State, 417 So. 2d 639, 644-45 (Fla. 1982).

In addition, the court erred in not considering the evidence of Lawrence's long-term drug and alcohol abuse. In its sentencing memorandum to the trial court, the state pointed out that a pre-sentence investigation report offered into evidence during the penalty phase of Lawrence's earlier trial indicated he had a history of alcohol and drug abuse. (R 24). "[M]itigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted." Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993). A history of drug or alcohol abuse is mitigating, regardless of whether the statutory mental mitigators were established. Caruso; Clark v. State, 609 So. 2d 513 (Fla. 1992).

The error of improperly rejecting the mitigating evidence denied Lawrence a fair, reliable sentencing contrary to the eighth and fourteenth amendments to the United States Constitution and Article I, Sections 9 and 17, of the Florida Constitution.

ISSUE VIII

SECTION 921.141(7), FLORIDA STATUTES, WHICH PERMITS INTRODUCTION OF VICTIM IMPACT EVIDENCE IN A CAPITAL SENTENCING PROCEEDING, IS UNCONSTITUTIONAL.

A. Section 921.141(7) is Unconstitutional as it Leaves Judge and Jury with Unguided Discretion Allowing for Imposition of the Death Penalty in an Arbitrary and Capricious Manner.

Effective July 1, 1992, the Florida Legislature enacted section 921.141(7), part of the Florida capital sentencing statute. This statute was enacted in response to the United States Supreme Court's opinion in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). However, by enacting this statute, the Florida Legislature responded to Payne without giving full consideration to the statute's constitutional impact on the Florida capital sentencing procedure set forth in Chapter 921.141, Florida Statutes.

The sentencing scheme provided in Florida law is unlike the law reviewed by the Court in Payne in that Florida is a "weighing" state. In other words, the law requies a jury and the judge to weigh specifically enumerated and defined aggravating circumstances that have been proven beyond a reasonable doubt against mitigating circumstances in determining the appropriate sentence. s. 921.141, Fla. Stat. The law reviewed by the Court in Payne set no such limits. Unlike Florida, Tennessee's capital sentencing law is very broad:

> In the sentencing proceeding, evidence may

> be presented as to any matter that the Court deems relevant to the punishment and may include but not be limited to the nature and circumstances of the character, the crime; the defendant's background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated . . .

T.C.A. 39-13-204(c) (1982) (emphasis added).[6]

Section 921.141(5), Florida Statutes, specifically limits the prosecution to the aggravating circumstances listed in the statute: "Aggravating circumstances s a be limited to the following . . ." (emphasis added). Accord Elledge v. State, 346 So. 2d 998, 1002-10 (Fla. 1977). The consideration of matters not relevant to aggravating factors renders a death sentence under Florida law violative of the Eighth Amendment. Socher v. Florida, 112 S.Ct. 2114, 117 L.Ed.2d 326 (1992); Stringer v. Black, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992).

It might be argued that victim impact evidence is not weighed, it is merely considered. This begs the question of how to apply this statute in a constitutional manner:

> "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly and capricious action."

Godfrey v. Georgia, 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64

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[6]It is also noteworthy that Tennessee requires a unanimous verdict of the jury to recommend death; Florida requires only a bare majority.

L.Ed.2d 398 (1980) (quoting Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)).

The concern with randomness and arbitrary sentencing procedures has been the underlying theme of the Supreme Court's death penalty decisions. In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Supreme Court held that the death penalty could not be imposed under the sentencing procedures in effect because of the substantial risk that it would be inflicted in an arbitrary and capricious manner as a result of unbridled discretion. Several years later, in reviewing the Florida statute, the Supreme Court upheld the constitutionality of the death penalty finding that the statutory scheme "seeks to assure that the death penalty will not be imposed in an arbitrary or capricious manner." Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976).

The very problem inherent in this new statute is that one does not know where victim impact evidence factors into the sentencing determination. Although it might be argued that victim impact evidence is not to be weighed but merely considered, it is the very consideration of factors not inherent in the weighing process that has caused reversal of several death sentences. In Burns v. State, 609 So. 2d 600 (Fla. 1992), this Court reversed the death sentence where evidence was introduced concerning the deceased's background and character as a law

enforcement officer. The Court held that it was harmless error as it related to the guilt phase but found it to be reversible error as it related to the penalty phase. Specifically, this Court held it was not relevant to any material fact in issue. It is particularly noteworthy that Burns was decided after Payne v. Tennessee. Similarly, in Taylor v. State, 583 So. 2d 323, 329-30 (Fla. 1991), the Florida Supreme Court reversed for a new penalty phase due to a prosecutor making an argument designed to invoke sympathy for the deceased. The Court relied on its prior opinion in Jackson v. State, 522 So. 2d 802, 809 (Fla. 1988), in which it held such argument to be improper "because it urged consideration of factors outside the scope of the jury's deliberation." The use of victim impact evidence allowed for imposition of the death penalty in an arbitrary and capricious manner.

B. Section 921.141(7), Florida Statutes, is Vague and Overbroad and Therefore Violative of the Due Process Guarantees of the Florida and United States Constitutions.

The victim impact statute provides that "such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the communities members by the victim's death." This language contains no definition or limitations.

A statute, especially a penal statute, must be definite to be valid. Locklin v. Pridgeon, 30 So. 2d 102 (Fla. 1947). An attack on a statute's constitutionality must "necessarily

succeed" if its language is indefinite. D'Alemberte v. Anderson, 349 So. 2d 164 (Fla. 1977). The statute at issue here clearly fails under any standard of definiteness required by the United States and Florida Constitutions.

The phrase "loss to the community" contains no definition of community or limits on it membership. This could lead to anyone testifying or even to death sentencing by petition or public opinion poll.[7] The phrase "uniqueness as a human being" places absolutely no limit on this evidence. Who defines uniqueness?

The Supreme Court has frequently addressed the issue of vagueness of legislatively defined aggravating circumstances. "Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)." Maynard v. Cartwright, 486 U.S. 356, 362-63, 108 S.Ct. 1853, 1957-59, 100 L.Ed.2d 372 (1988). Similarly, in Espinosa v. Florida, 112

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[7]The Florida Constitution provides "Victims of crime or their lawful representative including next-of-kin of homicide victims, are entitled . . . to be heard when relevant . . . . to the extent that these rights do not interfere with the constitutional rights of the accused." Art. I, section 16. The victim impact statute broadens these rights to the community at large.

S.Ct. 2926, 120 L.Ed.2d 854 (1992), the Court held "our cases further establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor."

Perhaps of greatest concern, victim impact evidence as defined in this statute permits and may foster the special danger of racial or class prejudice infecting a capital sentencing decision. Both the United States Supreme Court and the Florida Supreme Court have recognized the special danger of racial prejudice infecting a capital sentencing decision in a case involving a black defendant and a white deceased. Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986); Robinson v. State, 520 So. 2d 1 (Fla. 1988). The introduction of victim impact evidence can be expected to result in even further discrimination toward defendants and imposition of the death penalty being rendered in an even more arbitrary manner.

Moreover, victim impact evidence leads to discrimination against victims, contrary to the guarantee contained in our constitution of equal protection of the laws. Article I, Section 2, Florida Constitution. This Court has recognized that the victim's lack of social acceptability is not a proper basis for a jury recommendation of life. See Bolender v. State, 422 So. 2d 833 (Fla. 1982), cert. denied, 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983); Coleman v. State, 610

So. 2d 1283 (Fla. 1992), cert. denied, 114 S.Ct. 321, 126 L.Ed.2d 267 (1993). Nonetheless, victim impact evidence lends itself to comparing one individual's life against the value of another. Will one victim, depending upon race, social standing, religion, or sexual orientation, be more deserving of a death sentence for his or her killer? Is a murder which does not impact the "community" less heinous than one that does?[8]

Many reported decisions already reveal examples of attempts to exploit a victim's piety. See e.g. South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207 (prosecutor recited prayer and argued victim's religiousness); Daniels v. State, 561 N.E.2d 487 (Ind. 1991) (prosecutor mounted life-size photo of victim in full military uniform and stressed tha the had been army chaplain); State v. Huertas, 553 N.E.2d 1058 (Ohio 1990) (victim's mother mentioned son's church going habits); Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983) (witness testified

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'Recall that the Nazis preyed on people they considered unworthy of life: Jews, Gypsies, homosexuals. The perceived sub-human status of the targets ostensibly justified any manner of outrage against them. Transported and later tattooed like cattle, victims were rated against one another in the fashion of animals, Camp commanders directed the younger and healthier captives rightward, to work; the old and weak, leftward, to die. While there is clearly no moral equivalence between genocide and capital punishment as practiced in the United States, the former by its very extremity highlights the need to resist all officially encouraged invidious distinctions founded on a person's class or caste, To countenance a capital sentence procedure that allows "'those to discriminate who are of a mind to discriminate,"' as does Payne with respect to victims, is to permit "grading" of humans, which Nazism (if nothing else) should brand as utterly beyond the pale. For the victim's status assumes no greater legitimacy as a basis for the lawful act of sparing or condemning a murderer than for the lawless murder itself." Vivian Berger, Payne and Suffering: A Personal Reflection and a Victim-Centered Critique, 20 Fla.St.L.Rev. 5 1 (1992).

that deceased was choir member at his church). Certainly the prosecution will not argue explicitly that a murder deserves death because the deceased had money or status or was white or religious. Yet characteristics like the articulateness of survivors frequently correlate closely with wealth and social position, thereby serving as surrogates for parameters nobody deems appropriate. So, too, victim attributes will import a certain community status.

In the event the state is permitted to use victim impact evidence, will it become a defense obligation to exploit or devalue victims in order to minimize such evidence or, in fact, to provide mitigation? In any event, devalued victims will be ignored at a minimum or, worst of all, their defects will be aired in sentencing proceedings. Certainly, if there is a principle of relevance to victim impact evidence that makes a victim's personal, familial, and social worth pertinent evidence in aggravation, worthlessness is these respects become pertinent evidence in mitigation.

Victim impact evidence asks a jury to compare the value of a victim's life to the value of other victims' lives and to the value of a defendant's life. The inherent risk that prejudice on racial, religious, social, or economic grounds, will infect this decision are unaccepted under the Florida and United States Constitutions. As such, the vagueness of the victim impact evidence renders this statute unconstitutional.

C. The Florida Constitution Prohibits Use Of Victim Impact Evidence.

The Florida Constitution requires that victim sympathy evidence and argument be excluded from consideration whether death is an appropriate sentence and provides broader protection than the United States Constitutions for the rights of a capital defendant. This Court recently found significant the disjunctive wording of article I, section 17 of the Florida Constitution, which prohibits "cruel or unusual punishment." Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991).[9] The Court in Tillman explicitly held that a punishment is unconstitutional under the Florida Constitution if it is "unusual" due to the procedures involved. The allowance of victim sympathy evidence and argument would violate article I, section 17. The existence of this evidence is totally random, depending upon the extent of the deceased's family and friends, and their willingness to testify.

The admission of victim impact evidence and argument would also violate the due process clause of article I, section 9, of the Florida Constitution. In Tillman, the Court stated that article I, section 9 holds "that death is a uniquely irrevocable penalty requiring a more intensive level of judicial scrutiny or process than lesser penalties." Id. at 169. The Florida Supreme Court's opinion in Tillman is clear indica-

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[9] This wording is in contrast to the ban on "cruel and unusual punishment" in the Eighth Amendment of the United States Constitution.

tion that victim impact evidence violates article I, sections 9 and 17, in a capital case, even it it is permitted in other cases.

The admission of victim impact evidence and argument violates article I, section 9 and 17, of the Florida Constitution, and the fifth, sixth, eighth and fourteenth amendments to the United States Constitution for related reasons. First, such evidence introduces into the penalty decision considerations that have no rational bearing on any legitimate aim of capital sentencing. Second, this proof is highly emotional and inflammatory, subverting a reasoned and objective inquiry which the courts have required to guide and regularize the choice between death and lesser punishments. Third, victim impact evidence cannot conceivably be received without opening the door to proof of a similar nature in rebuttal or in mitigation, further upsetting the delicate balance the courts have painstakingly achieved in this area. Fourth, the evidence invites the jury to impose the death sentence on the basis of race, class and other clearly impermissible grounds.

Victim impact evidence, whether considered a non-statutory aggravating circumstance or merely a factor to "consider" in the sentencing proceeding, encourages inconsistent, unprincipled and arbitrary application of the death penalty and therefore is violative of the fifth, sixth, eighth and fourteenth amendments of the United States Constitution and article I,

Sections 9, 17, and 21 of the Florida Constitution.

D. Section 921.141(7), Florida Statutes, infringes upon the exclusive right of the Florida Supreme Court to regulate practice and procedure pursuant to Article V, Section 2, Florida Constitution.

Article V, Section 2 of the Florida Constitution provides that the Supreme Court shall adopt rules for the practice and procedure in all courts.

> Practice and procedure "encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion 'practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." In Re: Florida Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla. 1972) (ADKINS, J concurring). It is the method of conducting litigation involving rights and corresponding defenses. Skinner . City of Eustis, 147 Fla. 22, 2 So: 2d 116 (1941).

Haven Federal Sav. and Loan Ass'n v. Kirian, 579 So. 2d 730 (1991).

This Court has relied on these principles to invalidate a wide variety of statutes, involving such topics as juvenile speedy trial, RJA v. Foster, 603 So. 2d 1167 (Fla. 1992); severance of trials involving counterclaims against foreclosure mortgagee, Haven; waiver of jury trial in capital cases, State v. Garcia, 229 So. 2d 236 (Fla. 1969); and the regulation of vior dire examination. In Re. Clarification of Florida Rules of Practice and Procedure, 281 So. 2d 204, 205 (Fla. 1973).

The statute at issue here is an attempt to regulate "practice and procedure."

The statute unconstitutionally invades the province of the Supreme Court by providing an evidentiary presumption that victim impact evidence will be admissible at the penalty phase of a capital case, regardless of its relevance toward proving an aggravating or mitigating circumstance. The statute also permits the prosecutor to argue in closing argument evidence that has previously been determined to be irrelevant in capital sentencing proceedings. See Jackson v. State, 522 So. 2d 802 (Fla. 1988) (prohibiting argument that the victims could no longer read books, visit their families, or see the sun rise in the morning).

Through enactment of the victim impact statute, the legislature has tried to amend portions of the Evidence Code without first obtaining approval of this Court as required by Article V.

The victim impact statute, if it is not an aggravating circumstance, is not substantive law. Rather, if the argument that it is merely evidence to be "considered" is accepted, then it must be legislatively determined relevant evidence. It is for the courts to determine relevancy, not the legislature.

E. Application of section 921.141(7), Florida Statutes, violates the Ex Post Facto clauses of Article I, Section 10, and Article X, Section 9, of the Florida Constitution, and Article I, Sections 9 and 10, of the United States Constitution.

The statutes in question took effect in 1992. The offense in this cause occurred in 1991. Article I, Sections 9 and 10, of the United States Constitution, prohibit Congress from enacting laws that retrospectively apply new punitive measures to conduct already consummate, to the detriment or material disadvantage of the wrongdoer. Through this prohibition, the framers "sought to assure that legislative acts give fair warning to their effect and permit individuals to rely on their meaning until explicitly changed." Weaver v. Graham, 450 U.S. 24, 28-29, 109 S.Ct. 960 (1981).

Florida has also adopted an ex post facto prohibition under article I, section 10, of the Florida Constitution. This provision states that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." An ex post facto law, such as the instant one, applies to events that occurred before it existed, which results in a disadvantage to the defendant. Blankenship v. Dugger, 521 So. 2d 1097 (Fla. 1988).

In Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), the Court held a law is ex post facto if "two critical elements [are] present: First, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" (quoting Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). Both elements are

present here. The law took effect since the alleged crime, and adds a powerful reason for imposing death as a punishment which is not permitted to be considered at the time of the offense. The previously well-recognized exclusion of such evidence in a number of cases because of its inflammatory, non-statutorily aggravating nature is stark recognition of the new law's substantial disadvantage. Grossman v. State, 525 So. 2d 833 (Fla. 1988) (holding similar victims' rights statute unlawful to apply to capital sentencing), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989); Booth v. Marvland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) (declaring such evidence violative of the Eighth Amendment), overruled Payne v. Tennessee.

At the time of the defendant's crime, Florida law prohibited the consideration of victim impact evidence as a sentencing consideration. This is clearly a substantial substantive right which is protected by the ex post facto clause of the United States Constitution and the Florida Constitution. In the event the statute is deemed to be purely procedural and therefore not violative of the ex post facto clause, it must be considered a violation of the separation of powers and the Supreme Court's exclusive jurisdiction to adopt rules for the practice and procedure of all courts.